

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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METLIFE LIFE AND ANNUITY COMPANY  
OF CONNECTICUT,

Plaintiff,

**DEFENDANT  
DELIO'S  
PROPOSED  
SUPPLEMENTAL  
JURY  
INSTRUCTONS**

-against-

ANA NICOLE DELIO; ZACHARY FARRELL  
SOBIE; BRIAN SOBIE, individually, as TRUSTEE  
Of the ZACHARY FARRELL SOBIE GRANDCHILD  
TRUST, and as CO TRUSTEE of the ANA NICOLE  
DELIO GRANDCHILD TRUST; and MICHAEL  
MENDELSON as CO TRUSTEE OF THE ANA  
NICOLE DELIO GRANDCHILD TRUST

**07 Civ 7215  
(KARAS, J.)**

Defendants  
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Defendant, Ana Nicole Delio, by her attorney, James R. Carcano Esq., proposes  
the following supplemental jury instructions:

“Members of the Jury, the issue you must decide is who are the beneficiaries of  
the METLIFE Annuity Contract owned by decedent ESTELLE SOBIE. The SOBIE  
Defendants claim that the annuity contract is owned by the ANA NICOLE DELIO  
GRANDCHILD TRUST, the ZACHARY FARRELL SOBIE GRANDCHILD TRUST,  
and BRIAN SOBIE, each owning 1/3 of said trust. ANA NICOLE DELIO claims that  
the annuity contract is owned by the ANA NICOLE DELIO GRANDCHILD TRUST  
and the ZACHARY FARRELL SOBIE GRANDCHILD TRUST, each owning 1/2 of said  
trust.

The SOBIE Defendants rely on a purported change of beneficiary form executed by ESTELLE SOBIE on April 2, 2004 for their claim. Defendant Delio asserts that the change of beneficiary form is invalid.

Under New York State Insurance Law section 3204, a policy of life insurance or a contract of annuity cannot be modified, nor can any rights or requirements be waived, except in a writing signed by a person specified by the insurer in such policy or contract. Additionally, under New York Law, the controlling consideration as to whether a change of beneficiary form has been effectuated is whether there has been substantial compliance with the terms of the policy. (*Lincoln Life and Annuity Company of New York v. Caswell*, 31 AD 3d 1, 813 NYS 2d 385, App Div 1<sup>st</sup> Dept 2006). There must be an act or acts designed for making the change, though they may fall short of accomplishing it. Mere intent is not enough (*Aetna Life Ins. Co. v. Sterling* 15 AD 2d 334, 335, 224 NYS 2d 146 1962).

This case will be decided on the basis of the answers that you give to certain questions that will be submitted to you. Each of the questions calls for a “Yes” or “No” answer. If you answer “Yes” to a question, you must enter a percentage for that response. If you answer “No” to a question, you must enter zero for the percentage. The sum of your answers must total one hundred percent (100%). . . REMAINDER OF NY PJI 7:31b LANGUAGE INSERTED HERE.”

### **ARGUMENT**

This charge is based upon both *Lincoln Life and Annuity v. Caswell*, supra, and *McCarthy v. Aetna Life Ins. Co.* 92 NY 2d 436, 681 NYS 2d 790, 704 NE 2d 557, which

make clear that substantial compliance with the terms of the annuity contract must be shown.

Counsel for the Sobie defendants has asserted in both his proposed jury instructions and motion in limine that Kane v. Union Mutual Life Insurance Co. 84 AD 2d 148, 445 NYS 2d 549 and Matter of Trigoboff, 175 Misc 2d 370, 669 NYS 2d 185 apply to this case.

However, counsel has failed to recognize that both Kane and Trigoboff are no longer the law in this State, as each was overruled by the New York Court of Appeals decision in McCarthy, supra. Specifically, the Court is referred to the decision in Lincoln Life v. Caswell 813 NYS 2d 385, 390 wherein the Court specifically rejects the holdings in both Kane and Trigoboff. Furthermore, in the accompanying footnote 2, the Court states that Kane “is no longer good law.”

Thus, the jury must be instructed according to the correct law of the State of New York as asserted in both Lincoln Life and McCarthy.

Dated: Larchmont, New York  
April 24, 2008

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